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HOME RULE IN MONTANA

by

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Montana Commission on Local Government

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PREFACE

This paper was prepared for a national conference on Partnership Within the States: Local Self-government in the Federal System. The paper was one of a series on "Home Rule in the Fifty States." In this context, "home rule" is used in this paper in its broadest meaning which includes both functional and structural freedom for local governments. The Montana Constitution does not use the term "home rule" but it does provide for both functional and structural freedom for local governments.

While the structural "home rule" provisions of the constitution are not identified by a specific name, the functional "home rule" provision is called "self-government powers." Although every effort has been made in Montana to use "self-government powers" when referring to functional "home rule," many people have simply substituted the familiar term "home rule" for "self-government powers."

This paper, written for a national audience, distinguishes between functional and structural "home rule" in Montana. I hope that the use of "home rule" in regard to alternative forms of government does not confuse Montanans who have learned that "self-government powers," or "home rule" in Montana, at least, refers technically only to functional freedom for local governments and not to structural freedom.

In fact, if Montanans would delete the term "home rule" from their vocabulary, it would save much unnecessary confusion.

Dale A. Harris

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Dale A. Harris\*

INTRODUCTION: MONTANA'S VOTER REVIEW OF LOCAL GOVERNMENT

THE CONSTITUTIONAL MANDATE

Montana is preparing to celebrate the 1976 Bicentennial with a revolutionary change in state-local relations. The people of Montana authorized these changes with the adoption of the 1972 Montana Constitution which establishes a framework for structural and functional home rule for all units of local government. The new Constitution authorizes a unique procedure for citizen involvement in the transition from the old system of prescribed forms of municipal and county government and granted "Dillon Rule" powers to the new system of structural and functional home rule.<sup>1</sup>

The structural home rule system includes: (1) statutory alternative forms of government for municipal and county governments which may be modified and amended by options; (2) charter writing for municipalities and counties; and (3) consolidation and confederation plans. The functional home rule system, which may be adopted by both municipalities and counties, is a "residual power" or "shared power" system based on the American Municipal Association (now the National League of Cities) proposal<sup>2</sup> which has been endorsed by the Advisory Commission on Intergovernmental Relations,<sup>3</sup> the National Municipal League,<sup>4</sup> and the National Association of Counties.<sup>5</sup> Units of local government adopting "self-government" powers, as they are called in the Montana Constitution, will have "any power not prohibited by [the] constitution, law or charter."

In addition to permitting all local government units to adopt self-government (home rule) powers, the new Constitution significantly increases the authority of local governments that do not adopt home rule. These units will continue to have "Dillon Rule powers," or what the Constitution calls "general powers." But "general powers" will now include "legislative powers" for counties, such "legislative powers" were not possessed by counties under the previous Constitution. Also, under the new Constitution the "general powers" of a local government are to be "liberally construed." Finally, all units of local government, unless prohibited by law or charter, will have direct residual constitutional authority

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to: cooperate in the exercise of any function, power, or responsibility; share the services of any officer or facilities; transfer or delegate any function, power, responsibility, or duty of any officer to one or more other local government units, school districts, the state, or the United States.

In addition to establishing the legal framework for a system of structural and functional home rule, the 1972 Constitutional Convention authorized a dual process for its implementation. First, the Convention recommended total revision of Montana's local government code; and second, it created a unique process called the "Voter Review of Local Government." This dual process was authorized to counteract the inertia in local government and to achieve both significant reform in state-local relations and structural and functional reform in each municipality and county.

The Constitutional Convention recommended that a thorough revision of Montana's local government laws be undertaken to provide for:

(1) A system of statutory alternative forms of local government that could be modified by options within each form,

(2) A system for writing and adopting charters,

(3) A system for consolidation of governmental units,

(4) A system of laws granting authority to local governments with Dillon Rule powers that takes into consideration both the grant of legislative powers to counties and the liberal interpretation directive of the Constitution, and

(5) A system of laws prohibiting units of government with self-government power from exercising certain powers denied them by the Constitution, state law or local charter.

The Constitution's most unique provision required the legislature to provide procedures ". . . requiring each local government unit or combination of units to review its structure and submit one alternative form of government to the qualified electors . . ." on or before the general election in 1976. This section, entitled "Voter Review of Local Government," sets the stage for Montana's unique experiment in local government reform. Of equal importance with the provision that the mandated review be completed by November of 1976, is the constitutional requirement that "The legislature shall require a review procedure once every ten years after the first election." The Local Government Committee of the Convention explained the philosophy of the provision:

The committee strongly believes that such local review of government is highly desirable. Costs would be minimum and more than repaid if local governments can be improved. Increased voter interest and awareness of local government issues would be assured, and some local units, through experimentation, might find

answers to local government problems that would aid other units in the state.

An overriding consideration is that the local voters would be the final judges of whether the alternative proposed really would be a better form of government than that in effect at the time of the election. Even if every county, city and town decides to retain its existing form of government following the review procedure, the committee believes the time spent in study and discussion of local government will result indirectly in more responsive and responsible local government.<sup>6</sup>

#### EXECUTIVE RECOMMENDATIONS

In 1973, Governor Thomas L. Judge prepared and issued a policy paper on the implementation of the local government article of the 1972 Constitution. Declaring the "70's" as the "Decade of Local Government," he recommended the establishment of a temporary State Commission on Local Government to prepare a new code of local government law based on comprehensive studies of local government structure, powers, services, finance and state-local relations. Governor Judge also recommended the election of citizen study commissions in each of the 182 Montana cities, towns and counties in November, 1974. The purpose of the local study commissions would be to study the structure and authority of their local governments and to submit to the electors of their jurisdiction a statutory alternative form of government, charter, or city-county consolidation plan in 1976. The voters of each local government will have the opportunity to adopt the proposed new form or to retain existing forms of government. The Governor also recommended that the study commissions have the power to authorize a vote on the adoption of self-government powers by their local government unit.

#### LEGISLATIVE IMPLEMENTATION

The Governor's policy paper was acted upon by the 1974 Montana Legislature which created and funded a nine member State Commission on Local Government. The 1974 and 1975 Legislatures adopted legislation creating elected study commissions and defining their authority as the Governor had recommended. Separate legislation authorizing statutory alternative forms of local government, charter writing, consolidation, and confederation was passed. The 1975 Legislature also adopted a bill establishing the limits on the powers of local governments that adopt self-government powers. In accordance with recommendations made by the Constitutional Convention and the Governor, the State Commission on Local Government is now preparing the remainder of the new code of local government law. The code will be submitted to the 1977 Legislature.

In addition to the preparation of the new code, the Commission is conducting a comprehensive study of local government finance and services. Recommendations based on these studies will also be presented to the 1977 Legislature. In these studies, the Commission

is considering both general and special state-local revenue sharing, local option taxes, state assumption of existing local financial responsibilities, and state technical assistance to local government. The State Commission on Local Government is studying the existing technical services available to local government and will present recommendations for additional state services to the 1977 Legislature.

#### LOCAL STUDY COMMISSIONS

The 632 members of the 182 municipal and county local government study commissions were elected in November 1974 and are now engaged in individual and joint studies of the structure, authority, and services of their units of local government. At least twenty of the study commissions, representing the larger population aggregations, have full time staffs. In addition to their authority discussed above, the individual county and municipal study commissions are authorized to conduct joint studies for the purpose of recommending city-county or county-county consolidation, confederation, or transfer of the responsibility for providing a service from one local government unit to another.

The work of the local study commissions is funded by a \$1,000,000 state grant matched by another \$1,000,000 in municipal and county funds. The State Commission on Local Government is providing technical consulting assistance to the 182 study commissions through a program of publications, regional workshops, and direct consultation with individual commissions. State associations of local officials and university units are also providing assistance to the study commissions. Since all Montana communities are simultaneously involved in reviewing their local governments, the possibilities of sharing and learning from ideas gathered by citizens seeking to achieve similar ends are excellent. The study commissions are required to adopt preliminary reports by June 30, 1976 and final reports by August 1, 1976. New forms of local government and other changes approved by the voters during 1976 will become effective May 2, 1977. Officials elected to the new forms of government take office on the same date.

#### THE SPIRIT OF '76

Perhaps the most remarkable aspect of this process is the constitutional mandate that the legislature require a review procedure once every ten years after the initial election on an alternative form of government for each local government.

The idea of mandating the periodic calling of a constitutional convention to revise a state constitution has long been accepted and is now found in many state constitutions, including Montana's. Montana, however, is the first state to institutionalize this Jeffersonian idea in a local government article by requiring the periodic review of each local government unit by its citizens. By

adopting its new Constitution and implementing its unique voter review of local government provisions, Montana embodies and renews the spirit that Jefferson wrote about in 1816:

Laws and institutions must go hand in hand with the progress of the human mind . . . As new discoveries are made, new truths disclosed and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times . . . Each generation . . . has the right to choose for itself the form of government it believes the most promotive of its own happiness . . .<sup>7</sup>

In Montana we call this "The Spirit of '76."

## STRUCTURAL HOME RULE

### ALTERNATIVE FORMS OF LOCAL GOVERNMENT

The 1972 Constitution requires, and the 1975 Legislature provided for, a comprehensive system of structural home rule for Montana municipalities and counties. The principle features of the system include:

- (1) A "smorgasboard" or "cafeteria" of statutory alternative forms of government for municipal and county governments that may be modified and amended by statutory sub-options,
- (2) Charter writing for municipalities and counties, and
- (3) Authorization for consolidation and confederation plans.

The 1975 Legislature authorized six basic forms of local government. A description of each of the six alternative forms follows. The term "commission" is used to refer to any elected legislative body. The term "executive" refers to any independently elected executive officer.

(1) COMMISSION-EXECUTIVE FORM: elected commission and an executive officer elected at-large; similar to the present mayor-council form in use in 123 of Montana's cities and towns. This form, which may be called the "council-executive," the "council-mayor," or the "commission-mayor" form, is available to all municipalities, counties, and consolidated governments.

(2) COMMISSION-MANAGER FORM: elected commission, which then appoints a manager who serves as chief administrative officer; presently in use in three cities and one county in Montana. This form, which may be called the "council-manager" form, is available to all municipalities, counties, and consolidated governments.

(3) COMMISSION FORM: elected commission which exercises legislative, executive, and administrative powers. Presently used by 55 of Montana's 56 counties. The commission form may provide for the election or appointment of the clerk and recorder, clerk of the district court, county attorney, sheriff, treasurer, surveyor, county superintendent of schools, assessor, coroner, and public administrator, in addition to the members of the commission. This form is available to all municipalities, counties, and consolidated governments.

(4) COMMISSION-CHAIRMAN FORM: elected commission, which then elects from its members a chairman who serves as the chief executive officer. This form is similar to a parliamentary form. The chairman has the authority of a strong mayor. The form is available to all municipalities, counties, and consolidated governments.

(5) TOWN MEETING FORM: an assembly of the town's qualified electors serves as the legislative body and an elected chairman serves as the chief executive officer; limited to towns of less than 2,000 persons; similar to New England town meetings.

(6) CHARTER FORM: study commission drafts its own form of government which must include a legislative body and must specify which officials have chief administrative responsibilities. This form is available to all municipalities, counties, and consolidated governments.

#### SUB-OPTIONS

The basic structure of each alternative form, except the charter form, is established by law, but within these basic alternative structures each local study commission may select from a number of sub-options, thereby creating its own tailor-made form of local government.

The alternative forms law offers an extremely wide range of sub-options. There are no completely pre-packaged forms, but rather six basic forms within which a variety of sub-options may be selected. Local study commissions have the opportunity to duplicate or approximate nearly any form of local government presently employed in the United States. The format of the bill -- its division into major alternative forms and sub-options -- is designed to facilitate the work of the local study commissions and to facilitate future amendments to the alternative forms. Procedures for such amendments were mandated by the 1972 Constitution.

Sub-options, for most of the basic alternative forms, include:

- Partisan or non-partisan election of officers.
- Term of office of elected officers.
- Selection of the presiding officer for the legislative body.
- Election of commissioners to concurrent or overlapping terms of office.
- Budget authority of the chief executive.
- Appointment power of the chief executive.
- Veto authority of the chief executive.
- Mandatory or permissive appointment of administrative assistants.
- Appointment or election of officials in addition to the legislative body and chief executive.
- Election of commissioners by district or at-large.
- Size of the legislative body.
- Mandatory or permissive election of community councils to advise the legislative body.

Although the study commission may submit an alternative form or charter, including all sub-options, to the voters as a single question, three of the sub-options included as part of the alternative form may be placed on the ballot as separate questions to be decided by the voters.

Under the requirements of the Constitution and the 1975 statute, the alternative form to be submitted to the voters in 1976 "must differ in some manner from the existing form of local government." Thus, the alternative submitted to the voters could be a completely new form or a simple change in the existing form, such as increasing the appointment power or budget authority of the mayor or making an elected office, e.g. the office of county surveyor, an appointive office.

Depending upon the sub-options selected, a local study commission could create, at a minimum, the following common forms of local government:

- strong mayor-council
- weak mayor-council
- mayor-council-administrative officer
- modified city commission
- traditional Montana county commission-plural executive
- modified county commission
- commission-strong mayor-commissioner
- city or county commission-administrative officer
- commission-city manager
- commission-county-manager
- town meeting, and
- various forms of consolidated and confederated governments.

In the interest of maximum flexibility, with the one exception of the town meeting, which can only be used by towns of 2,000 people or less, no limits were placed on the adoption of different types of forms by municipalities, counties, or consolidated units of local government.

The term "commission" is used throughout the law to refer to elected legislative bodies such as city or town councils and county commissions. The term "executive" is used to refer to an elected head of a local government executive branch. Thus, the mayor-council form and the elected county executive form are both commission-executive forms. This uniform terminology is used to divide the various forms into six easily distinguishable categories although the law specifically authorizes the use of alternate terminology such as the "mayor-council" form of government. The use of the terms "commission" and "executive" effects a uniform terminology in all parts of the new local government code when referring to legislative bodies and executive officers. But local communities will still be able to identify their commission as a "council" rather than a "commission" and their executive as a "mayor" rather than an "executive."

The town meeting form differs from the traditional New England town meeting, but the fundamental principles are the same. A major difference between the two is the replacement of the traditional New England board of selectmen with a single town chairman who exercises the authority of a strong mayor. The Montana town meeting law also permits the appointment of a town manager or the appointment of an administrative assistant to the mayor.

The Constitution specifically authorizes county commissioners to consolidate two or more elected executive offices and authorizes two or more counties to provide for joint offices. The alternative forms law provides that officers, such as treasurers and auditors, may now have their duties established by ordinance of the county commission rather than by state law. This change will permit the reorganization of county offices even if the county does not adopt another form of government. X X X

#### CHARTERS

If local study commissioners do not find a suitable form of government among the alternative forms, they may write their own charter. Study commissions have broad discretion in drafting local government charters. This discretion is intended to permit the drafting of the kind of charter which can accommodate local circumstances, problems, and opportunities. Charter-writing will be especially useful for local governments considering city-county consolidation or confederation.

The voter review procedures law permits the study commission to submit parts of a proposed charter to the electors as separate questions. This will permit study commissions to submit controversial items to a separate vote of the electorate.

Beyond some very minimal requirements, a proposed local government charter may be as innovative and unique as desired, but it must provide for the exercise of legislative and executive powers by the local government and may establish other administrative organizational structures. Thus the charter must create a legislative body, a chief executive, and may establish separate boards, bureaus and agencies, such as library boards and health departments. Boards and agencies not established by the charter may be created later by ordinance of the local legislative body. X

It should also be noted that charter provisions must not conflict with the statutory limits placed on the powers of self-government units and must not conflict with any Constitutional provision. The legislative restrictions on self-government units are contained in a separate law on local self-government powers.

The 1972 Montana Constitution provides in Article XI, Section 5, that

Charter provisions establishing executive, legislative, and administrative structure and organization are superior to statutory provisions.

The Constitution also provides that the adoption of a charter does not require approval by a legislative body. Furthermore, the Constitution would have permitted local governments and citizens to initiate procedures for adopting charters if the state legislature had not provided procedures by July 1, 1975.

#### DISINCORPORATION

While it is not technically a form of government, the law authorizing the Montana Voter Review of Local Government procedures permits municipal local government study commissions to offer the question of disincorporation to the voters instead of an alternative form of local government. If disincorporation is approved by the voters, the assets of the municipality are transferred to the county. The county may then establish tax and service districts in the disincorporated area to retire any outstanding debts of that area or to provide municipal services.

FUNCTIONAL HOME RULE

DUAL SYSTEM OF LOCAL GOVERNMENT POWERS

All Montana municipalities and counties have only granted Dillon Rule powers until they adopt residual or shared home rule powers. The 1972 Montana Constitution specifically terms Dillon Rule powers "General Powers" and residual, shared, or home rule power as "Self-Government Powers."

Regarding General Powers, Article XI, Section 4 of the new Constitution provides:

(1) A local government unit without self-government powers has the following general powers:

- (a) An incorporated city or town has the powers of a municipal corporation and legislative, administrative, and other powers provided or implied by law.
- (b) A county has legislative, administrative, and other powers provided or implied by law.
- (c) Other local government units have powers provided by law.

(2) The powers of incorporated cities and towns and counties shall be liberally construed.

Section 4 broadens the scope of "General Powers" from that of the previous Constitution in two important ways. It permits the legislature to grant legislative powers to counties and it provides that the powers of municipalities and counties are to be "liberally construed."

Article XI, Section 6 of the 1972 Constitution provides for Self-Government Powers as follows:

A local government unit adopting a self-government charter may exercise any power not prohibited by this constitution, law, or charter. This grant of self-government powers may be extended to other local government units through optional forms of government provided for in Section 3.

Section 6 automatically grants self-government powers to local governments that adopt charters. Self-government powers may also be adopted by local governments which choose a statutory alternative form. The legislature has extended the option of self-government powers to every alternative form of government except any of the commission forms of government, which includes the traditional county commissioner-plural executive form. Self-government powers were denied to the commission form because that form does not provide

for a separation of legislative and executive authority; such denial may encourage counties to change their traditional government structures to acquire the increased authority of self-government powers.

#### THE NEED FOR A NEW LOCAL GOVERNMENT CODE

With its creation of a dual system of local government powers (General and Self-Government) the members of Montana's Constitutional Convention also recognized that the revision of the existing body of local government law into a new code would be mandatory. A new code would have to take into account the legislative authority granted to counties and, in a separate part, would have to establish the restrictions or prohibitions on the authority of local governments with self-government powers. The Governor's 1973 position paper confirmed the need for a code outlining such prohibitions. The 1975 Legislature created the State Commission on Local Government to draft such a code of restrictions on self-government powers and to revise the laws granting powers to municipalities and counties with general government powers.

The following extensive material, borrowed from the First Annual Report of the State Commission, discusses in detail the difficulties that face any state adopting residual or shared powers. Of equal importance with regard to self-government powers is the need for specific legislative determination of the limits of self-government power. The need for this review is dictated by two possibilities. First, if self-government powers become effective with the existing statutory scheme intact, it may be that the courts will find that existing statutes intended as "permissive" have now become restrictive, prohibiting local responses to local problems. This danger was recognized by the Iowa Municipal Law Review Study Committee which observed:

As long as all of the 'enabling' legislation remain in the Code, it is possible that courts will interpret this as the intent of the legislature to retain control over these areas of law, and will interpret an exercise of power by a city in any of these areas as 'inconsistent'.<sup>8</sup>

The director of the Alaska Local Affairs Agency made the following prediction in 1960, which came true in 1971 and resulted in a belated revision of the Alaska local government laws:

In the absence of a comprehensive legislative review of all statutes and legislative prohibitions on the exercise of home rule powers, the courts will be hard pressed not to adopt a rule of conflict or inconsistency or, at least of implied prohibition on home rule power.<sup>9</sup>

A staff report prepared for a Florida legislative committee considering the implementation of a home rule amendment to their constitution makes the same point. It then goes on to point out a second quite different possibility, saying:

Under this interpretation, an old statute providing for the exercise of some municipal power in a narrowly restrictive manner would now operate as a prohibition of the exercise of that power in some other manner. Only a clear prohibition would limit the home rule power.<sup>10</sup>

Should this view be adopted by the Montana courts without further legislative action, it would leave self-government units subject only to the Constitution and to whatever limits were incorporated in their charters.

Either of the two possible judicial constructions of self-government powers under the existing statutory schemes is undesirable. The first because it defeats the purpose of self-government powers by chaining local government to legislatively prescribed responses and the second because it sets local government free to thwart state policy in areas which are of state-wide concern or which require uniform treatment.

The states of Alaska, Florida, and Iowa have revised their local government laws to conform with the adoption of Constitutional provisions for self-government power. The revisions in Alaska and Florida were delayed until unfavorable court decisions forced the revision; the revision in Iowa preceded the effective date of home rule powers.

The Iowa revision repealed sixty-two chapters and retained eleven chapters relating to matters that required state regulation. The Alaska revision repealed the former two titles on boroughs and municipal government and enacted a single new title.

The Florida revision repealed all thirteen chapters relating to local government and replaced them with a single chapter on municipal government. Authorities in Pennsylvania, Massachusetts, and Illinois are recommending revision of local government laws to conform with their self-government power constitutional amendments, as was recommended by the Advisory Commission on Intergovernmental Relations:

The only way for states to deal effectively with inevitable legislative delay in granting local government power to discharge necessary new functions is to provide a broad, unambiguous grant of functional power. However, if this were done, constitutionally and per se, without the right of affirmative legislative reservation, preemption, and restriction, all kinds of problems would arise out of a

lack of responsibility and prudence or from placing local decisions above the general interest. Therefore, it is important to emphasize that the delegation of residual powers should be preceded by a careful review of affirmative limitations upon the powers of local government within a State. Such delegation should occur simultaneously with the enactment of a local code, by which the State legislature places necessary limitations upon local powers and reserves other powers for the State. (Underscoring supplied.)

The Local Government Subcommittee of the Montana Constitution Revision Commission in its January 1970 Report noted:

Recently, another approach to [providing] constitutional powers for local government has been gaining adherents. Its thrust is to grant full legislative authority to units of local government subject to control by the state legislature through enactments which restrict local legislative action or which deny power to act in certain areas. Under the concept, local governments would require the legislature to survey [existing] statutory law relating to local government and to distinguish those matters that are probably the State's responsibilities. Most observers consider that the state at least must be free to devise a coordinated tax structure for both local and state government and to establish general rules for the incorporation, alteration of boundaries, merger, consolidation, or dissolution of local governments. At the same time, local governments should be unfettered by detailed regulations of the procedures by which they provide local services. (Underscoring supplied.)<sup>12</sup>

A study entitled Local Government, prepared for the 1972 Constitutional Convention by the Montana Constitutional Convention Commission, noted:

It also is certain that a successful switch to the shared powers concept in Montana would require a thoughtful study of the entire body of local government law by the legislature. The goal would be to determine what powers should be circumscribed or withheld completely from local governments. The requirement for such a study was well stated in 1959 by a New York commission, which had recommended shared powers for local governments:

One of the most important immediate effects of adoption of the proposed new Local Government Article would be the resulting need for the Legislature to take a fresh new look at a mass of statute law affecting local governments. This does not mean that it would in itself upset all or most of the existing statute law. It does mean that it would require a wide

examination of local government law and such revision and supplementation of it as may be needed to conform it to the new pattern of state-local relations. (Underscoring supplied.)<sup>13,14</sup>

The 1975 Montana Legislature took careful notice of the above-mentioned complexities. It adopted a bill drafted by the State Commission which establishes the limitations on the powers of local government units adopting self-government powers. The State Commission will propose a complete revision of the general powers local government laws to the next session of the legislature.

#### CONSTITUTIONAL PROVISION

The 1972 Montana Constitution is the source of self-government powers. The legislature can restrict the scope of such powers only by adopting prohibitions on their exercise by local governments. Also, the 1972 Constitution refers to "all powers" and does not contain any of the traditional limiting phrases found in other state constitutions, phrases such as "legislative power," "power which the legislature has power to grant," "municipal functions," "municipal services," "local affairs," "government and administration of local and municipal matters." The convention clearly did not want a "local affairs test" to develop in Montana. It wanted the courts to depend solely on the test of whether the legislature had "prohibited" a power to local governments. Theoretically, in Montana, there should be no other judicial test of the validity of an action by a unit of local government with self-government powers.

Compared to other home rule systems, the Montana version of functional home rule has two important constitutional characteristics. First, under the Montana Constitution there is no area constitutionally protected from legislative regulation. Lack of a constitutionally protected area of "local affairs" is a marked departure from home rule systems of most states. Second, under the Montana Constitution, a local government wishing to act in a particular area need not make the determination of whether that area is of purely local concern before it acts. If the legislature has not denied local governments with self-government powers the power to act, they may act even if their actions affect matters of more than local concern.

#### STATUTORY IMPLEMENTATION

The 1975 statute establishing limits on self-government powers provides that these powers are vested in the local government legislative body and may be exercised only by ordinance or resolution. The law also provides that all state statutes continue to be applicable to self-government local units until they are superseded by an ordinance or resolution adopted by the local government legislative body. If a local government is granted self-government

powers by a vote of its people, the government will continue to exercise authority and provide services in the manner provided by existing state statutes. The local government will continue to function under state law until it enacts ordinances to supersede those state laws and the executive will have only those self-government powers granted by ordinance.

Thus, the statute provides for an orderly exercise of self-government powers and it allows self-government units to take advantage of existing state laws where appropriate, instead of being forced to adopt a complete set of home rule ordinances.

Specifically, the code of restrictions will:

- Deny specific powers to local governments.
- Require delegation of certain others.
- Create an area of concurrent jurisdiction between state and local government.
- Impose certain laws on self-government units.
- Impose certain duties on local governments to act as agents of the state.

The following powers are denied:

- Power to regulate private or civil relationships (contracts, real estate, probate, marriage).
- Power to regulate labor relations.
- Power over public school systems.
- Power to establish felonies.
- Power over right to keep or bear arms.
- Employee pension or retirement rights.
- Certain activities of state agencies, such as game management, utility siting, mined-land reclamation, chartering banks and savings and loan associations, and Public Service Commission determinations.

The following powers require delegation by the legislature:

- Power to authorize a tax on income or a tax on the sale of goods and services.
- Extraterritorial powers.
- Power to impose a duty on another local government.
- Power to exercise any judicial function.
- Power to regulate any form of gambling.

The following statutory tests created a broad area of concurrent jurisdiction between the state and local governments. The statute provides that:

"A local government with self-government powers is prohibited the exercise of any power in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control." The statute also provides that

"The exercise of a power is inconsistent with state law or regulation if it establishes standards or requirements which are lower or less stringent than those imposed by state law or regulation." The statute further provides that "An area is affirmatively subjected to state control if a state agency or officer is directed to establish rules and regulations governing the matter or if enforcement of standards or requirements established by statute is vested in a state officer or agency."

The statute lists specific state laws that will apply to local government with self-government powers:

- All state laws providing for the incorporation or dis-incorporation of cities and towns, for the annexation, disannexation or exclusion of territory from a city or town, for the creation, abandonment or boundary alteration of counties and for city-county consolidation.
- All state laws authorizing the procedures for changing forms of local government.
- All state laws establishing legal government legislative procedures.
- All state laws regulating the local elections procedures.
- All state laws regulating fiscal administration except laws establishing taxes.

The law provides that local governments with self-government powers are still required, as agents of the state, to perform any function that is mandated by state law. These functions include conducting elections, recording land titles and water rights, recording vital statistics, and collecting certain state taxes and fees.

Self-government units will have the freedom to determine their own internal structure including departments, boards, bureaus, and commissions. They will also determine the type, level and method of providing services such as roads, health services, fire and police protection, libraries, parks, water and sewer service, and solid waste disposal. Self-government units will have the power to determine the subjects and rates of taxation with the two exceptions of a sales or income tax, neither of which may be used unless specifically authorized by the legislature.

Self-government units will be prohibited from exercising certain powers such as regulating contract, real estate, probate, and family law. In other areas subject to state licensing and regulation, local governments will be able to exercise powers concurrently with the state so long as local standards are at least as stringent as state standards. Local governments may, for example, set higher water pollution standards than those established by the state.

#### CHARTER PROHIBITIONS

Units of local government adopting a charter will be able to adopt additional "prohibitions" on the self-government powers of the local government. Because the Constitution is the source of self-government authority for self-government units, a Montana charter will not need to "grant" powers to the local government; in fact, such grants could be later interpreted as restrictions of the "residual" powers of the local government. As in state constitutions, charters in Montana should be charters of restriction rather than grant. The practical effect of enumerating powers in the charter would be to restrict local powers by implication.

Municipalities and counties that adopt alternative forms of government with the self-government option will not have the opportunity to adopt further local restrictions on the self-governing powers of the local government unit. Such local restrictions can only be adopted if a charter is drafted.

#### SUMMARY OF FUNCTIONAL HOME RULE

In summary, a local government with self-government powers will continue its operations under the authority of relevant state law until it wishes to take action under its home rule powers. If a power is not prohibited to local governments with self-government powers by statute, constitution or charter, the local government may take any action it deems proper without prior state authorization.

The first chance a local government will have to acquire self-government powers is through the voter review process. At the end of the review process, the local study commission must determine whether self-government powers are to be included as part of its proposal to the voters. If self-government powers are included as an option in the proposed alternative form, or are made available through a charter, they must be approved by a majority of those voting on the question.

## CONCLUSIONS

Montana has an untested functional and structural home rule system that has been carefully developed to implement the Local Government Article of the 1972 Montana Constitution. Elected citizen study commissions for every local government unit in Montana are now conducting studies of the structure and authority of their local governments to determine what alternative form of government or charter and what type of powers they will submit to the voters during 1976. In 1977 the new code of local government law will be proposed to the legislature, officials of the new forms of government will be elected, and municipalities and counties that adopt functional home rule powers will begin to exercise their new authority.

The executive and legislative responses to the functional and structural home rule provisions of the Constitution have been positive and innovative. Local government officials, through their organizations, have strongly supported the implementation process. Local citizens have become involved through the voter review process, as have civic groups, universities, businesses, and labor organizations. The courts have not had an opportunity to play a role in the implementation process and the actual impact of structural and functional home rule on the activities of Montana local governments is yet to be determined.

NOTES

1. The Montana Commission on Local Government and other agencies have published extensive information explaining the voter review process. The major sources are listed in the Selected Bibliography attached to this paper. The Local Government Article of the 1972 Montana Constitution is attached to this paper as Appendix A and the legal citations to implementing statutes are listed in the bibliography. Individual citations to constitutional and statutory provisions are not included in the text of this paper.
2. American Municipal Association, Model Constitutional Provisions for Municipal Home Rule, (Chicago, 1953). This proposal was authored by Jefferson B. Fordham and is often referred to either as the AMA proposal or by the author's name.
3. Advisory Commission on Intergovernmental Relations, State Constitutional and Statutory Restrictions Up on the Structural, Functional and Personnel Powers of Local Government, Report A-12, (Washington: U.S. Government Printing Office, 1962), p. 74. Cited hereafter as ACIR, State Constitutional and Statutory Restrictions.
4. National Municipal League, Model State Constitution, 6th ed., rev. 1968, (New York, 1963, 1968), Sec. 8.02.
5. National Association of Counties, American County Platform 1974-75, (Washington, 1974), p. 11.
6. Montana, Montana Constitutional Convention, Local Government Committee Proposal No. 11, (Helena, 1972), pp. 31-32.
7. Letter to Samuel Kerchval, July 12, 1816.
8. Iowa, Municipal Laws Review Study Committee, Summary of Home Rule Bill, (Des Moines, 1971), p. 1.
9. Alaska, Office of the Governor, Local Affairs Agency, Alaska Local Government, Vol. 2, No. 8 (1962), p. 4.
10. Florida, Committee on Community Affairs, History and Status of Local Government Powers in Florida, (Tallahassee, 1972), p. 50.
11. ACIR, State Constitutional and Statutory Restrictions, p. 73.
12. Montana, Montana Constitutional Convention Commission, Constitutional Provisions Proposed by Constitutional Revision Commission Subcommittees, Occasional Paper No. 7, (Helena, 1971), p. 31.
13. Montana, Montana Constitutional Convention, Local Government Studies, No. 16, (Helena, 1971), pp. 86-87.
14. New York, Temporary Commission on the Revision and Simplification of the Constitution, First Steps Toward a Modern Constitution, Legislative Document No. 58, (December 31, 1959), p. 20.

## APPENDIX A

### 1972 MONTANA CONSTITUTION

#### ARTICLE XI

##### LOCAL GOVERNMENT

Section 1. Definition. The term "local government units" includes, but is not limited to, counties and incorporated cities and towns. Other local government units may be established by law.

Section 2. Counties. The counties of the state are those that exist on the date of ratification of this constitution. No county boundary may be changed or county seat transferred until approved by a majority of those voting on the question in each county affected.

Section 3. Forms of government. (1) The legislature shall provide methods for governing local government units and procedures for incorporating, classifying, merging, consolidating, and dissolving such units, and altering their boundaries. The legislature shall provide such optional or alternative forms of government that each unit or combination of units may adopt, amend, or abandon an optional or alternative form by a majority of those voting on the question.

(2) One optional form of county government includes, but is not limited to, the election of three county commissioners, a clerk and recorder, a clerk of district court, a county attorney, a sheriff, a treasurer, a surveyor, a county superintendent of schools, an assessor, a coroner, and a public administrator. The terms, qualifications, duties, and compensation of those offices shall be provided by law. The Board of County Commissioners may consolidate two or more such offices. The Boards of two or more counties may provide for a joint office and for the election of one official to perform the duties of any such office in those counties.

Section 4. General Powers. (1) A local government unit without self-government powers has the following general powers:

(a) An incorporated city or town has the powers of a municipal corporation and legislative, administrative, and other powers provided or implied by law.

(b) A county has legislative, administrative, and other powers provided or implied by law.

(c) Other local government units have powers provided by law.

(2) The powers of incorporated cities and towns and counties shall be liberally construed.

Section 5. Self-government charters. (1) The legislature shall provide procedures permitting a local government unit or combination of units to frame, adopt, amend, revise, or abandon a self-government charter with the approval of a majority of those voting on the question. The procedures shall not require approval of a charter by a legislative body.

(2) If the legislature does not provide such provisions by July 1, 1975, they may be established by election either:

(a) Initiated by petition in the local government unit or combination of units; or

(b) Called by the governing body of the local government unit or combination of units.

(3) Charter provisions establishing executive, legislative, and administrative structure and organization are superior to statutory provisions.

Section 6. Self-government powers. A local government unit adopting a self-government charter may exercise any power not prohibited by this constitution, law, or charter. This grant of self-government powers may be extended to other local government units through optional forms of government provided for in Section 3.

Section 7. Intergovernmental cooperation. (1) Unless prohibited by law or charter, a local government unit may

(a) cooperate in the exercise of any function, power, or responsibility with,

(b) share the services of any officer or facilities with,

(c) transfer to delegate any function, power, responsibility, or duty of any officer to one or more other local government units, school districts, the state, or the United States.

(2) The qualified electors of a local government unit may, by initiative or referendum, require it to do so.

Section 8. Initiative and referendum. The legislature shall extend the initiative and referendum powers reserved to the people by the constitution to the qualified electors of each local government unit.

Section 9. Voter review of local government. (1) The legislature shall, within four years of the ratification of this constitution, provide procedures requiring each local government unit or combination of units to review its structure and submit one alternative form of government to the qualified electors at the next general or special election.

(2) The legislature shall require a review procedure once every ten years after the first election.

## APPENDIX B

### VOTER REVIEW OF LOCAL GOVERNMENT TIMETABLE

The Voter Review Procedures Laws provide for the following timetable for the voter review of local government process. Under the requirements of Section 9, Article XI of the 1972 Montana Constitution, the election on the alternative form must occur on or before November 2, 1976, the date of the general election in 1976.

The timetable provides that the transition to the new form occurs by May 2, 1977, so that the new government may prepare and adopt the budget for the fiscal year 1978 which begins July 1, 1977.

April 15, 1974	Size of commissions established.
August 1, 1974	Filing deadline for commission candidates.
November 5, 1974	Election of study commissions.
November 16, 1974	Deadline for appointments to fill positions not filled by elections.
November 15-26, 1974	Commissions shall organize not later than ten days after all study commissioners are elected or appointed.
October 1, 1975	Deadline for general public hearing.
June 1, 1976	Deadline for distribution of tentative proposed form.
August 1, 1976	Deadline for adoption of final report.
30 days before election	Deadline for distribution of report to qualified electors.
2 successive weeks in the period before election	Publish a summary of findings and recommendations in a newspaper.
November 2, 1976	Deadline for special election on alternative forms of government.

60 days after the election	Deadline for filing petitions for judicial review of the procedures to adopt the alternative form or charter.
December 1, 1976	Deadline for filing existing or proposed plan of government with state and local agencies.
December 1, 1976	Effective date of reapportionment plan and provisions creating offices for purpose of electing new officials.
January 7, 1977	Deadline for filing nomination declarations for county, city and town primaries.
February 8, 1977	Special local government primary to nominate candidates.
April 5, 1977	Special local government general elections to elect local government officials.
May 2, 1977	Effective date of new code of local government law. Effective date of new forms of local government. Newly elected members of local governments assume duties of office.
June 30, 1977	All study commissions terminate June 30, 1977.

## SELECTED BIBLIOGRAPHY

### Reports

Judge, Thomas L. Modernizing Local Government: Why It Cannot Wait. Helena: Office of the Governor, September 14, 1973.

Montana State Commission on Local Government, "Annual Report to Legislature," Local Government Review Bulletin, Vol. 1, No. 3, November 8, 1974.

Montana State Commission on Local Government, "Voter Review Laws, Comments, and Summary," Local Government Review Bulletin, Vol. 2, No. 5, June 2, 1975.

### Constitution and Statutes

"Article XI Local Government," Constitution of the State of Montana. Secretary of State, Helena, 1972.

"Powers of Self-Government Local Government." Part 7, Chapter 1 and 2, Title 47A, Revised Codes of Montana, 1947.

"Alternative Forms of Local Government." Part 3, Chapter 2, Title 47A, Revised Codes of Montana, 1947.

"Local Government Study Commissions." Chapter 51, Title 16, Revised Codes of Montana, 1947.

### Handbook for Study Commissions

Lopach, James J. and Lauren S. McKinsey Handbook of Montana Forms of Local Government. Missoula: University of Montana, Bureau of Government Research, June 1975.

### Citizen Guides

Lopach, James J. Charter Writing in Montana: A Citizens Guide. Bozeman: Montana State University, Cooperative Extension Service, June 1975.

Lopach, James J. Forms of Local Government in Montana: A Citizens Guide. Bozeman: Montana State University, Cooperative Extension Service, June 1975.

Lopach, James J. and Peter Koehn. Local Government Review: The Spirit of 1976. Bozeman: Montana State University, Cooperative Extension Service, September 1974.

Lopach, James J. and Peter Koehn editors. Self-Government Powers in Montana: A Citizens Guide. Bozeman: Montana State University, Cooperative Extension Service, July 1975.

Pamphlets

Lopach, James J. and Peter Koehn. "Review of Local Government." Bozeman: Montana State University, Cooperative Extension Service, June 1974.

Thornton, June R. "Local Government Review: The Chance of a Lifetime!" Missoula: University of Montana, Bureau of Government Research, July 1975.